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IN THE

Supreme Court of the United States

October Term 1939

No. [redacted] 5

HARRY H. NEUBERGER,

Petitioner,

—*against*—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REHEARING OF PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Suggestion of New Conflict Warranting Certiorari and Alternative Motion to Defer Consideration of the Petition for Rehearing until the Fall Term

JOSEPH M. PROSKAUER,
WALTER MENDELSOHN,
WILBUR H. FRIEDMAN,
Counsel for Petitioner.

May, 1940.

IN THE

Supreme Court of the United States

October Term 1939

No. 548

HARRY H. NEUBERGER,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REHEARING OF PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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POINT I.

Suggestion of new conflict warranting present grant of certiorari.

This case is pending on petition for rehearing of petition for certiorari and on motion to defer consideration of the petition for rehearing until the decision of a pending case in the Court of Claims involving the same questions (*Central Hanover Bank & Trust Co., et al., Executors* v. *United States*).

The Circuit Court of Appeals for the Fifth Circuit has recently decided the case of *Zelda Baker Jennings, et al.* v. *Commissioner of Internal Revenue* (printed in full in the appendix), in conflict with the decision in this case. It is believed that the Court is warranted in granting certiorari now on the basis of this conflict without waiting for the decision in the *Central Hanover* case.

One of the issues in this case is whether partnership security profits retain their identity on the partner's individual income tax return so as to enable him to offset against them his individual security losses, under a statute limiting the deductibility of security losses to security profits. The Court below, following its earlier decision by a divided Court in the *Johnston* case (86 F. (2d) 732), denied this right. The stated ground of the *Johnston* decision was that partnership income does not retain its identity in the partner's individual return unless Congress has expressly so provided.

In the *Jennings* case, the taxpayer sought to offset individual gambling losses against her share of partnership gambling gains. Section 23(g) of the 1936 Revenue Act provided that losses from wagering transactions are allowable only to the extent of the gains from such transactions, just as §23(r) of the 1932 Act (here in question) provided that non-capital security losses are allowable only to the extent of non-capital security gains. There was no provision in the 1936 Act that partnership wagering gains retain their identity in the partner's hands.

The Board of Tax Appeals, following the decision of the Second Circuit in the *Johnston* case, held that the partnership wagering gains lost their identity when distributed to the partner, and that the individual wagering losses could not be offset against the partnership wagering gains. The Circuit Court of Appeals reversed. The majority cited the

Sixth Circuit decision in the *Coulby* case (258 F. 27), where it had been held that partnership dividend income retained its identity as such in the partner's hands despite the absence of any provision in the statute to that effect, and said:

> "The partnership return is for information, and to secure uniformity and save repetition in the individual returns. It ascertains each partner's gain and apportions it to him to be taxed, whether distributed or not. It does not transform his share in the gain. If 'individuals carrying on business in partnership,' to use the phrase of the statute, make gains in wagering transactions, the share of each is a wagering gain; and when it is entered on his individual return to be taxed, a deduction of his losses in other wagering transactions is allowed by the statute, but only to the extent of such gains."

This, of course, is precisely the opposite from the general rule adopted by the Second Circuit in the *Johnston* case. The Fifth Circuit referred to the fact that the *Johnston* case dealt with a different statutory provision, which provision had been amended; but in 1932, the year here in question, the statute provided that non-capital security losses could be offset only against non-capital security profits, just as the statute in the *Jennings* case provided that gambling losses could be offset only against gambling profits. The amendment to which the Fifth Circuit refers was passed in 1933, effective as of January 1, 1933 (§218(d) of the National Industrial Recovery Act). It provided that partnership security losses could not be offset against individual security profits (the converse of the question in this case). It was passed as a result of the Senate Finance Committee Investigation of Stock Exchange practices, which disclosed that during the depression years partners of pri-

vate banking houses had paid no personal income tax by virtue of the application of partnership security losses against their individual incomes, an evil which the National Industrial Recovery Act sought to correct. But there has never been any provision, either by amendment or otherwise, denying to a partner the right to offset his individual security losses against his partnership security profits; and in 1932, the provision regarding the offset of security losses against security profits was the same as the 1936 provision dealing with wagering gains and losses.

The dissenting judge in the *Jennings* case thought the *Johnston* case controlling, saying:

> "An identical question of statutory construction was presented to the court in *Johnston* v. *Commissioner, supra,* the only difference being that this case involves Section 23(g), which relates to wagering losses, while the *Johnston* case involved Section 23(r), which limited the deduction of losses sustained on the sale of non-capital assets in relation to the gains from such sales. It is true, there was a dissent in that case, and the majority opinion here follows in principle the reasoning of that dissent, though this is a weaker case for the application of the principle, as a gambling partnership is not entitled to legislative encouragement as is a legitimate business."

Thus we find that, in the absence of statutory provision, the Sixth Circuit in the *Coulby* case (dividend income), the Fifth Circuit in the *Jennings* case (wagering income) and the Court of Claims in the *Craik* case (income from foreign sources, 31 Fed. Supp. 132) have all held that partnership income retains its identity in the partner's hands. The decision of the Court below that partnership security profits do not retain their identity in the partner's hands is in conflict with these decisions, and for this reason, certiorari should now be granted.

POINT II.

Alternative motion to defer decision of petition for rehearing until the Fall Term.

Petitioner has asked this Court to defer consideration of the petition for rehearing of the petition for certiorari until the decision by the Court of Claims in the *Central Hanover* case. That case was argued in the Court of Claims on May 8, 1940, and it is not likely that it will be decided before this Term of this Court ends. If the Court is not inclined to grant certiorari for the reasons set forth in Point I above, petitioner respectfully moves that decision on the petition for rehearing be postponed until the Fall Term. No prejudice can result to the Government from such a postponement since the tax in this case has been paid, and the request for postponement would appear to be meritorious in view of the state of the law as disclosed in Point I.

Respectfully submitted,

JOSEPH M. PROSKAUER,
WALTER MENDELSOHN,
WILBUR H. FRIEDMAN,
Counsel for Petitioner.

May, 1940.

Appendix.

Zeida Baker Jennings, et al., Petitioners v. *Commissioner of Internal Revenue*, Respondent.

United States Circuit Court of Appeals for the Fifth Circuit. No. 9383. Decided April 11, 1940.

Petition for review of decision of Board of Tax Appeals.

Before Sibley, Hutcheson & Holmes, Circuit Judges.

SIBLEY, Circuit Judge: We think the Board of Tax Appeals wrongly refused to allow the petitioners to deduct individual losses in gambling from gambling gains made in partnership, on redetermining their several income taxes for the year 1936. The facts were stipulated. The Board found: "The distributive share of each petitioner of partnership gains from gambling operations exceeded the amount of losses by petitioners in their individual gambling operations." The Revenue Act of 1936, Sect. 23(g), referring to deductions, provides: "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions." The Board thought the partnership in making up its return could offset its wagering losses against its wagering gains, and each partner might similarly offset his wagering losses against his wagering gains, but that each partner's share of wagering gains made in the partnership could not be reduced by wagering losses made individually.

We find nothing in the statute to support the last proposition. A partnership is recognized as an entity separate from the partners in bankruptcy proceedings, but not in income taxation. *United States* v. *Coulby*, 258 Fed. 27. For many years the Revenue Acts have provided that "*individuals* carrying on business in partnership shall be liable for income tax only in their *individual* capacity." Rev. Act of 1918, §218(a). 40 Stat. 1057, Revenue Act of 1936, §181, 49

Stat. 1648. Thereunder a tax on income earned in partnership was held not a claim against the partnership in bankruptcy, and it went unpaid for lack of individual assets. *United States* v. *Kaufman,* 267 U. S. 408 [1 USTC ¶116]. The partnership return is for information, and to secure uniformity and save repetition in the individual returns. It ascertains each partner's gain and apportions it to him to be taxed, whether distributed or not. It does not transform his share in the gain. If "individuals carrying on business in partnership," to use the phrase of the statute, make gains in wagering transactions, the share of each is a wagering gain; and when it is entered on his individual return to be taxed, a deduction of his losses in other wagering transactions is allowed by the statute, but only to the extent of such gains.

The Board followed especially the decision in *Johnston* v. *Commissioner,* 86 Fed. (2d) 732 [36-2 USTC ¶9547], which held a partner's losses by sale of noncapital assets could not be offset against a similar gain coming from his partnership, one judge dissenting. We are impressed that the dissenting judge was probably right, but that case dealt with a different statutory provision, and it had been amended by Congress, the purpose of the amendment being one of the disputed points. No amendment of the provision before us has been made, and its words seem plain enough.

The cause is remanded with direction to allow the deductions claimed and redetermine the taxes accordingly.

HOLMES, Circuit Judge, dissenting; The majority opinion holds that petitioners are entitled to offset personal losses from gambling operations against their distributive shares of partnership gains from similar operations. To concur in this ruling, it is necessary to conclude that, while Con-

gress provided for the separate computation of partnership income, it intended that the total so reached would be discarded and the individual items of gain or loss would then be separated and each brought forward into the returns of the respective partners, and there combined with individual income and deductions to arrive at the partners' net taxable income. The legislative intent, it seems to me, was just the opposite.

A defendant, in a suit against him for a debt due by him alone, may not offset a debt due to him and another, because the parties are different and there is a want of mutuality.[1] With this bed-rock principle in mind, the Congress undertook to regulate the method of accounting with a taxpayer as to income derived from the operations of a partnership. The firm, as an entity, is required to make a return but is not required to pay the tax. In this respect it has an advantage over a corporation.

Individuals carrying on business in partnership are liable for income tax only in their individual capacity. Each partner, in computing his net income, shall include in his individual return his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual. A partnership is not a taxable entity for income tax payment, but it is an entity for the purpose of computing the income upon which the partners individually are taxable.[2]

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[1] 57 C. J., p. 454, Sec. 105, *et seq.*, *Mintz* v. *Tri-County Natural Gas Co.*, 259 Pa. 477, 103 A. 285; *Boehm* v. *U. S.*, 20 Ct. Cl. 142.

[2] Sections 23, 181, 182, and 183 of the Revenue Act of 1936, ch. 690, 49 Stat. 1648; *Johnston* v. *Commissioner*, 86 F. (2) 732 [36-2 USTC ¶9547], Cert. denied, 301 U. S. 683.

The inference is clear that Congress did not intend that income from a partnership should retain in the individual partner's return the same characteristics which it had in the partnership, except as specially provided in Sections 184, 185, and 186 of said Revenue Act of 1936, which special provisions negative any other exceptions.[3] The distributive share which the individual partner is required to include in his return may result from the computation of separate items of gain or loss, but is distinct from those items and has a separate identity. It is reported as a separate item in the partner's return just as the shareholder reports a corporate dividend. The complications of any other method of accounting are apparent.

An identical question of statutory construction was presented to the court in *Johnston* v. *Commissioner, supra,* the only difference being that this case involves Section 23(g), which relates to wagering losses, while the *Johnston* case involved Section 23(r), which limited the deduction of losses sustained on the sale of non-capital assets in relation to the gains from such sales. It is true, there was a dissent in that case, and the majority opinion here follows in principle the reasoning of that dissent, though this is a weaker case for the application of the principle, as a gambling partnership is not entitled to legislative encouragement as is a legitimate business. See also, to the same effect as the majority ruled in the *Johnston* case, *Klingenstein* v. *U. S.*, 18 Fed. Supp. 1015 [37-1 USTC ¶9255], Cert. denied, 302 U. S. 716.

In the Revenue Act of 1938, Section 182 was amended for the specific purpose of allowing the segregation of short-time gains or losses in the partnership return, and the retention of such status for use by the partner in his individual

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[3] *Botany Mills* v. *United States,* 278 U. S. 282, 289 [1 USTC ¶348].

return. In its report, the committee noted that the proposed change involved a departure from the general rule.[4] Since no such change or departure from the general rule was made by the Congress with reference to the statute limiting the deduction of wagering losses, the reasonable conclusion is that there was no intention to depart from the general rule where gambling gains or losses resulted from partnership operations. While, as we have seen, some exceptions were expressly made with reference to partnership items retaining their original characteristics in the partners' individual returns, it is undisputed that no such exception was expressly made which involved gains or losses from gambling operations; and I think none should be implied.

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[4] H. Rep. No. 1860, 75th Cong., 3rd Sess., pp. 42-43.

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SUPREME COURT OF THE UNITED STATES.

No. 5.—October Term, 1940.

Harry H. Neuberger, Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 12, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner, a resident of New York, was a member of the New York Stock Exchange. He was engaged in the business of trading in securities on the floor of the Exchange for the partnership of Hilson & Neuberger, of which he was a member, executing orders on behalf of customers of the partnership. In addition he made numerous purchases and sales of securities for his own account.

During the year 1932, the one here in question, Hilson & Neuberger derived a profit of $142,802.29 from the sale of securities which were not capital assets as defined in Section 101 of the Revenue Act of 1932. 47 Stat. 169, 191. The firm had other income of $170,830.65 and deductions of $203,981.78, or net income of $109,651.16. Petitioner's distributive share was $44,158.55. During the same year petitioner sustained a net loss of $25,588.93 on his private transactions in stocks and bonds which were not capital assets as defined in Section 101.

In his income tax return for the year 1932 petitioner deducted from gross income the loss of $25,588.93. The Commissioner disallowed the deduction and assessed a deficiency. The Board of Tax Appeals upheld the action of the Commissioner. 37 B. T. A. 223. On appeal the Second Circuit Court of Appeals affirmed. 104 F. (2d) 649. Because of substantial conflict with *Jennings* v. *Commissioner,* 110 F. (2d) 945, and *Craik* v. *United States,* 31 F. Supp. 132, we granted certiorari limited to the questions whether Section 23(r)(1) of the Revenue Act of 1932, 47 Stat. 169, 183, authorized the claimed deduction and whether, in the event that it

did not, the statute as so construed was constitutional. 310 U. S. 655.

Section 23 of the Revenue Act of 1932 sets out the allowable deductions from gross income. Section 23(r)(1) provides:

"Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed [as deductions from gross income] only to the extent of the gains from such sales or exchanges. . . ."

The basic and narrow question is whether, in computing the income of an individual partner, the word "gains" in Section 23 (r)(1) includes gains from sales or exchanges of partnership stocks and bonds which are not capital assets as defined in Section 101. We are of opinion that it does.

In computing gross income prior to the Revenue Act of 1932, subject to certain limitations a taxpayer was entitled to deduct the full amount of his losses from transactions in securities. Revenue Act of 1928, §§ 23(e), 23(g), 101(b), 113. But the growing custom of diminishing ordinary income by deducting losses realized on the sale of securities which had shrunk in value, due no doubt to the fall in prices after 1929, led Congress to provide in Section 23(r)(1) that deductions for such losses should be limited to gains from similar transactions.

That this was the purpose and the only purpose of Section 23 (r)(1) abundantly appears from the Report of the Senate Finance Committee accompanying the bill.[1] Nowhere does there appear any intention to deny to a taxpayer who chooses to execute part of his security transactions in partnership with another the right to deductions which plainly would be available to him if he had exe-

[1] Report of Senate Finance Committee (72d Congress, 1st Sess.), Number 705, p. 10:

"Your committee believes that security gains and losses should be segregated, that security losses should be deducted solely from security gains; but that security gains should not be taxed until they actually exceed security losses."

See also Report of House Ways and Means Committee (72d Congress, 1st Sess.), Number 708, pp. 12-13:

"There are no provisions in existing law corresponding to section 23 (r). . . . Many taxpayers have been completely or partially eliminating from tax their income from salaries, dividends, rents, etc., by deducting therefrom losses sustained in the stock and bond markets, with serious effect upon the revenue. Your committee is of the opinion that some limitation ought to be placed on the allowance of such losses."

cuted all of them singly. Nowhere is there any suggestion that Congress intended to tax noncapital security gains until they exceeded similar losses. The language of Section 23(r)(1) does not require such a construction. Nor do the available evidences of Congressional intent indicate such a purpose.

Respondent points out, however, that under Sections 181-189 of the Revenue Act of 1932, 47 Stat. 169, 222-223,[2] partnership income is computed on an entity basis, that items of partnership gross income do not appear on a partner's return, that only partnership net income is reflected in the individual partner's income and is reported only in the form of a distributable or distributed share. He contends that since partnership income is computed in the same

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2 Sec. 181. Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

Sec. 182. (a) There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year.

(b) . . .

Sec. 183. The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except that the so-called "charitable contribution" deduction provided in section 23(n) shall not be allowed.

Sec. 184. The partner shall, for the purpose of the normal tax, be allowed as a credit against his net income, in addition to the credits allowed to him under section 25, his proportionate share of such amounts of dividends and interest specified in section 25 (a) and (b) as are received by the partnership.

Sec. 185. In the case of the members of a partnership the proper part of each share of the net income which consists of earned income shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement.

Sec. 186. In the case of the members of a partnership the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under the rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement, but at the rates and in the manner provided in section 101 (a) and (b), relating to capital net gains and losses.

Sec. 187. The benefit of the special deduction for net losses allowed by section 117 shall be allowed to the members of a partnership under regulations prescribed by the Commissioner with the approval of the Secretary.

Sec. 188. The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax of the member of a partnership to the extent provided in section 131.

Sec. 189. Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

way as an individual's the deduction afforded by Section 23(r)(1) to the partnership is a distinct privilege not to be confused or combined with that afforded to the individual. Thus, he argues, the deduction claimed here is inconsistent with the general scheme created for reporting partnership income as well as, in effect, a second or double use of Section 23(r)(1).

It is not to be doubted that in the enactment of Section 23(r)(1) Congress intended not only to deal with individual security gains and losses, but also to permit losses suffered in partnership security transactions to be applied against partnership gains in like transactions. It does not follow, however, and the language of the statute does not provide, either expressly or by necessary implication, that losses sustained in an individual capacity may not be set off against gains from identical though distinct partnership dealings. If the individual losses are actually incurred in similar transactions it cannot justly be said that the same deduction is taken a second time, or that the real purpose of the statute, which is ultimately to tax the net income of the individual partner, would thereby be impaired.

Sections 181-189 of the Revenue Act of 1932, 47 Stat. 169, 222-223, provide generally for computation and reporting of partnership income. In requiring a partnership informational return although only individual partners pay any tax, Congress recognized the partnership both as a business unit and as an association of individuals. This weakens rather than strengthens respondent's argument that the privileges are distinct or that the unit characteristics of the partnership must be emphasized. Compare *Jennings* v. *Commissioner,* 110 F. (2d) 945; *Craik* v. *United States,* 31 F. Supp. 132; *United States* v. *Coulby,* 251 Fed. 982 (affirmed, 258 Fed. 27). Nor is the deduction claimed here precluded because Congress, in Sections 184-188, has particularized instances where partnership income retains its identity in the individual partner's return. The maxim "expressio unius est exclusio alterius" is an aid to construction not a rule of law. It can never override clear and contrary evidences of Congressional intent. *United States* v. *Barnes,* 222 U. S. 513.

It is true that the Treasury Department adopted a contrary position and denied the claimed deduction. G. C. M. 14012, XIV-1 Cum. Bull. 145; I. T. 2892, XIV-1 Cum. Bull. 148. Under different circumstances great weight has been attached to administrative prac-

tice and treasury rulings, but beyond question they cannot narrow the scope of a statute when Congress plainly has intended otherwise. *Rasquin* v. *Humphreys*, 308 U. S. 54; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.

It is true, too, that in some cases the characteristics of partnerships as business units have been emphasized, *Forres* v. *Commissioner*, 25 B. T. A. 154; *Wilson* v. *Commissioner*, 17 B. T. A. 976 (appeal dismissed, 55 F. (2d) 1086); *Burns* v. *Commissioner*, 12 B. T. A. 1209; *Appeal of Menken*, 8 B. T. A. 1062, while in others the characteristics of partnerships as associations of individuals have been stressed. *United States* v. *Coulby*, *supra*. Compare *Bence* v. *United States*, 18 F. Supp. 848. These cases, not decided under the Revenue Act of 1932 and turning, as they must, on their own peculiar facts, are little aid in ascertaining the effect to be given to Section 23(r)(1).

It is not true, however, as respondent argues, that the asserted deduction cannot be allowed because petitioner has suggested no way to calculate it properly or to import items of gross income from the partnership informational return. The Board of Tax Appeals expressly found the amount of partnership gains from security transactions and the proportion in which petitioner was to share in the profits of the partnership. 37 B. T. A. 223, 224. Since petitioner's share of these noncapital security gains is greater than his loss of $25,588.93, the limit on deductions set by Section 23(r)(1) is not exceeded.

Our conclusion that this is the proper construction of Section 23(r)(1) is confirmed by the action of Congress since 1932. In 1933 Congress amended Section 182(a) of the Revenue Act of 1932 to deny to individual partners deductions for partnership losses which had been disallowed in the partnership return, the converse of the instant case. 48 Stat. 195, 209.[3] More significantly, in 1938, after the Treasury Department had ruled to the contrary, G. C. M. 14012, XIV-1 Cum. Bull. 145; I. T. 2892, XIV-1 Cum. Bull. 148, Congress expressly provided for the deduction of individual security losses from similar partnership gains. Revenue

[3] In Senate Finance Committee Report Number 114 (73rd Congress, 1st Sess.) accompanying the bill, it is stated at page 7:

"Subsection (d) amends the partnership provisions of existing law. Under existing law the individual members of a partnership are entitled to reduce their individual net incomes by their distributive shares of a net loss incurred by the partnership."

That the amendment of 1933 changed and the Revenue Act of 1938 restored the law of 1932 as we have explained it is plain from the legislative history of the two Acts and of § 23 (r) (1).

Shearer v. *Burnet*, 285 U. S. 228, is not contrary to the conclusion we reach here. There the decision turned on the proper construction to be given to Section 218(a) of the Revenue Act of 1924, 43 Stat. 253, 275, and the court correctly concluded that Congress had not intended to allow the asserted credit.

We conclude that petitioner is entitled to the deduction. The decision of the Second Circuit Court of Appeals is reversed, and the case is remanded with directions to remand to the Board of Tax Appeals for proceedings in conformity with this opinion.

Reversed and Remanded.

Mr. Justice ROBERTS, Mr. Justice BLACK, and Mr. Justice DOUGLAS are of opinion that the judgment should be affirmed.

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Test:

Clerk, Supreme Court, U. S.

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[4] In House Ways and Means Committee Report Number 1860 (75th Congress, 3rd Sess.) accompanying the bill, it is stated at pages 42-43:

"The method of treatment provided in these sections of the bill is a logical corollary of the principle that only the partners as individuals, not the partnership as an entity, are taxable persons and is necessary to give the partners as individuals the benefit of the alternative tax in the case of net long-term capital gains, provided in section 117 (c), with respect to such gains realized upon the sale or exchange of partnership capital assets. It should be noted that this method involves a departure from the principle adopted in the Revenue Acts of 1934 and 1936. . . ."